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October 9, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 13, 2008

Case Number: TSO-0642

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter "the Individual") for access authorization (also referred to as a security clearance). The governing regulations are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, I have concluded that the Individual's access authorization should not be restored at this time.

I. Background

The Individual received a security clearance in 1993. DOE Ex. 8 at 3. In December 2006, an unidentified individual reported that the Individual may have used his office computer to access sexually explicit material during work hours. DOE Ex. 7 at 1. The ensuing investigation confirmed the allegation. *Id.* at 2. The Individual's employer gave him a written reprimand and suspended him for one week without pay. DOE Ex. 4 at 119.

In January 2008, the Local Security Office (the LSO) conducted a Personnel Security Interview (PSI) of the Individual. DOE Ex. 4. The Individual admitted that, over the period March 2006 to June 2007, he accessed increasingly explicit material. *Id.* at 7-11, 77-79. After the interview, the LSO referred the Individual to a DOE consulting psychiatrist (the DOE Psychiatrist), who evaluated the Individual and issued a report. DOE Ex. 3.

The DOE Psychiatrist did not diagnose the Individual with a mental condition affecting judgment and reliability. In the DOE Psychiatrist's view, the Individual had exercised "poor judgment," DOE Ex. 3 at 8, but had "learned his lesson" and "benefitted from counseling," *id.* at 9. The prognosis was "good" that the Individual would not access sexually explicit information in the future or misuse his work computer in any other way. *Id.*

In the spring of 2008, the LSO notified the Individual that his conduct raised a substantial doubt about his eligibility for a security clearance. DOE Ex. 1 (Notification Letter, Att.), citing 10 C.F.R. §§ 708.8(g), (1) (Criteria G and L). The Individual requested a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer. DOE Ex. 2. The OHA Director appointed me to serve as the Hearing Officer.

In his request for hearing, the Individual attributed his computer misuse to anxiety. DOE Ex. 2 at 2. He further stated that the underlying stressors were no longer present and that he had received medical care and counseling to help him manage anxiety. *Id.*

Both DOE Counsel and the Individual submitted exhibits. The DOE exhibits include an incident report, DOE Ex. 6, the PSI, DOE Ex. 4, and the Psychiatrist's Report, DOE Ex. 3. The Individual's exhibits consisted of the following: a witness list and chronology, Ind. Ex. 1, performance appraisals for the period 2004 to 2007, Ind. Ex. 2, a statement from a former supervisor, Ind. Ex. 3, a letter from the Individual's physician, Ind. Ex. 4, and the Individual's most recent performance appraisal, Ind. Ex. 5.

At the hearing, the Individual testified and presented the testimony of four other individuals - his wife, his brother, his Employee Assistance Program (EAP) counselor, and his current supervisor. A DOE security specialist and the DOE Psychiatrist also testified.

II. Applicable Regulations

The regulations governing an individual's eligibility for access authorization are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization

eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a security clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a Hearing Officer. *Id.* § 710.21(b)(3). At a hearing, the burden is on the individual to present testimony or evidence to demonstrate eligibility for access authorization, *i.e.*, that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a). The Hearing Officer's decision reflects "a comprehensive, common-sense judgment" based on all the relevant factors, including the nature, extent, and seriousness of the conduct, as well as any pertinent behavioral changes that have occurred since the conduct occurred. *Id.*

III. Findings and Analysis

A. Whether the Notification Letter Correctly Identifies a Security Concern

It is undisputed that, during the period March 2006 to June 2007, the Individual used his work computer during work hours to access sexually explicit material. It is also undisputed that this conduct was a violation of applicable rules. See, *e.g.*, DOE Ex. 8 at 2; DOE Ex. 4 at 115-16.

The Notification Letter correctly identifies the Individual's computer misuse as derogatory information under Criterion G and Criterion L. Derogatory information under those criteria raises concerns about an individual's willingness to comply with applicable rules and, more generally, an individual's judgment and reliability. Criterion G specifically applies where an individual has "violated or disregarded regulations, procedures, or guidelines pertaining to sensitive information technology systems." 10 C.F.R. § 710.8(g). Criterion L is broader and applies to "circumstances" indicating that the individual is "not honest, reliable, or trustworthy" or that "furnishes reason to believe" that the individual may be subject to pressure to act contrary to the interests of national security. 10 C.F.R.

§ 710.8(1). Thus, the Individual's misuse of his work computer raises Criteria G and L concerns about his willingness to comply with applicable rules and, more generally, his judgment and reliability. See generally *Personnel Security Hearing*, Case No. TSO-0058, 28 DOE ¶ 82,959 at 86,496-97 (2003). Accordingly, I now turn to whether the Individual has resolved those concerns.

B. Whether the Individual Has Resolved the Security Concerns

The Individual argues that the computer misuse was an aberration and will not recur. Accordingly, I consider the circumstances surrounding the computer misuse, subsequent actions taken by the Individual, and how much time has elapsed. See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House) (the Adjudicative Guidelines), Guidelines ¶¶ 17(c), 17(d), 41(a).

The Individual attributes his computer misuse to anxiety arising from stressful conditions at work and at home. See, e.g., DOE Ex. 2 at 2; Tr. at 8, 86-90. He cited a stressful job involving duties outside his expertise and a lack of sleep attributable to after-hours work on a house project, night-time noise from a road construction project, and church and family commitments. *Id.* at 86-87. Originally, the Individual used his work computer to search for non-sexual images but, as the stressful conditions increased, he began to access sexually explicit material. DOE Ex. 4 at 7-11. The Individual's witnesses corroborated the Individual's testimony about the stressful conditions. Tr. at 73-75 (wife), 30-37 (EAP counselor). The EAP counselor testified that the Individual's computer misuse was the Individual's attempt, albeit an inappropriate one, to relieve anxiety. *Id.* at 33-34.

The Individual testified that the stressful conditions no longer exist: he has a new job within his area of expertise, he has reduced his non-work commitments, and he has the tools to manage anxiety. See, e.g., Tr. at 9-12, 62, 86-92. The Individual's witnesses corroborated this testimony. See, e.g., *id.* at 67 (current supervisor), 75-77 (the Individual's wife). The Individual's physician and the EAP counselor also corroborated the Individual's testimony that he has received treatment for anxiety and counseling for managing stress. See Ind. Ex. 4 (physician's letter); Tr. at 30-39, 52, 54, 57 (EAP counselor). The DOE Psychiatrist views any future computer misuse as "extremely unlikely." Tr. at 110-11.

As additional support for his position that the computer misuse was an aberration, the Individual cites his work record. He testified that he has not had any workplace infractions and that he is committed to his job. Tr. at 9. See also DOE Ex. 2 at 4. The Individual's current supervisor testified similarly: he stated that the Individual is conscientious and meticulous in his work. Tr. at 67. The Individual's performance appraisals indicate that he is a valued employee. Ind. Exs. 2 and 5.

As the foregoing indicates, the Individual has presented evidence indicating that, during the period of time in question, he was suffering from anxiety, that the stressors are no longer present, and that he has obtained medication and tools to manage anxiety. Nonetheless, I cannot conclude that the Individual has resolved the security concerns. The Individual's computer misuse represents a failure to follow rules, as well as poor judgment. Moreover, the Individual's misuse extended over a significant period of time - 15 months. Finally, the Individual's insight is relatively recent. In January 2008, when the Individual was "pretty distraught," he used his work computer to access portraits of women on one of the web sites on which he had previously searched for sexually explicit material. DOE Ex. 4 at 120-23. Thus, as recently as nine months ago, the Individual was still turning to his work computer to relieve anxiety. Id. at 122. Based on the foregoing, it is too early to conclude that the Individual has resolved the concerns about his willingness to follow applicable rules and his judgment and reliability.

This decision is consistent with OHA precedent. Individuals have typically attributed computer misuse to anxiety or boredom; significant factors in determining whether the security concerns were resolved were the extent of the misuse and how recently it occurred. The misuse in the instant case - extending over 15 months and ending approximately one year before the hearing - is more extensive and recent than cases in which the individuals resolved the security concern. See *Personnel Security Hearing*, Case No. TSO-0541, 30 DOE ¶ 82,754 (2008) (less than one year's misuse, ending three years before hearing); *Personnel Security Hearing*, Case No. TSO-0510, 30 DOE ¶ 82,783 (2008) (two months' misuse, ending two years before the hearing). More importantly, the misuse in this case is more extensive than another case in which the individual did not resolve the concern. See *Personnel Security Hearing*, Case No. TSO-0058, 28 DOE ¶ 82,959 (2004) (four months misuse, ending approximately one year before the hearing). Accordingly, the conclusion that the Individual has not resolved the security concerns is well within OHA precedent.

V. Conclusion

It is undisputed that the Individual used his work computer to access sexually explicit material. The Notification Letter correctly identified this conduct as raising Criteria G and L concerns that the Individual is not reliable and trustworthy. Given the extent of the misuse and its recency, I cannot find that the Individual has resolved the concern. Accordingly, I cannot conclude that granting access authorization to the Individual "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Based on the foregoing, the Individual's suspended access authorization should not be restored. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: October 9, 2008